

**United States Department of Labor
Employees' Compensation Appeals Board**

T.G., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Richmond, VA, Employer**

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**Docket No. 18-1064
Issued: April 26, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 1, 2018 appellant filed a timely appeal from a February 23, 2018 merit decision and a March 12, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish total disability from work for the period March 9 to 11, 2017, causally related to her accepted employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 23, 2015 appellant, then a 43-year-old customer service representative, filed an occupational disease claim (Form CA-2) alleging that, on July 25, 2005, she first realized that she

¹ 5 U.S.C. § 8101 *et seq.*

had developed carpal tunnel syndrome in her left shoulder and wrist due to her federal employment duties. On September 8, 2005 OWCP accepted her claim for sprain and strain of the left shoulder, sprain and strain of the left wrist, sprain and strain of the neck, and tenosynovitis of the left upper extremity. It expanded appellant's claim to include aggravation of cervical degenerative disc disease. Appellant returned to regular-duty work on January 17, 2006. On May 23, 2006 she reduced her work schedule from eight hours to six hours a day.²

On February 22, 2015 appellant filed claims for wage-loss compensation (Form CA-7) for total disability from February 9, 2015 through January 7, 2016.³

In a March 10, 2015 development letter, OWCP notified appellant that it considered her claims for compensation to be a claim for a recurrence of disability. It requested that she provide additional narrative medical evidence establishing a change in the nature and extent of her accepted medical conditions resulting in her total disability for work for the period alleged. Appellant was afforded 30 days to respond.

Appellant submitted a series of reports signed by Laura Duncan, a nurse practitioner. In form reports dated April 5 and 7, 2015 as well as June 3, 2015, Dr. P. James Nugent, a Board-certified orthopedic surgeon, opined that appellant was totally disabled. He diagnosed cervical spine pain and stiffness.

By decision dated June 29, 2015, OWCP denied appellant's claim for recurrence of total disability. Appellant requested an oral hearing before an OWCP hearing representative on July 3, 2015.

Appellant provided July 27, and September 21, 2015 form reports from Dr. Nugent repeating his findings of total disability due to cervical pain and stiffness.

In reports dated January 7 and February 4, 2016, Dr. Sanjay J. Chauhan, a Board-certified neurologist, examined appellant due to neck pain, left shoulder pain, left elbow pain, left wrist and hand pain with numbness, aggravation of headaches, difficulty sleeping, and right shoulder pain. He diagnosed chronic left shoulder strain, left wrist and hand tenosynovitis and left wrist strain, chronic cervical strain, cervical spine degeneration, and left upper extremity tenosynovitis especially in the wrist. Dr. Chauhan attributed appellant's diagnosed conditions to her work activities including repetitive work, prolonged posture, and staring at the computer monitor. He determined that she could return to modified part-time work on January 6, 2016 with restrictions.

Appellant testified during the oral hearing held before an OWCP hearing representative on March 11, 2016. She alleged that her cervical condition had changed, resulting in her disability from work. Following the oral hearing, appellant submitted a December 16, 2014 report from Dr. Nugent who diagnosed cervical spine pain and cervical degenerative disc disease.

² By decision dated January 15, 2009, OWCP terminated appellant's wage-loss compensation and medical benefits. By decision dated May 5, 2009, an OWCP hearing representative vacated this decision. By decision dated November 12, 2009, OWCP terminated appellant's wage-loss compensation and medical benefits. By decision dated June 10, 2010, an OWCP hearing representative vacated this decision.

³ Appellant filed a series of claims for compensation (Form CA-7) through January 8, 2016. She returned to work six hours a day on January 8, 2016.

Appellant submitted reports from Dr. Chauhan dated February 27 and March 17 and 28, 2016. Dr. Chauhan reviewed Ms. Duncan's treatment notes and reported that appellant's July 27, 2015 x-ray demonstrated increased degeneration from C4-7 most marked at C5-6 with spurring and decreased disc height. He noted that Ms. Duncan believed that the increased cervical degeneration led to nerve impingement and appellant's increased radicular symptoms. Dr. Chauhan determined that, based on Ms. Duncan's records, appellant's cervical spine degeneration had spontaneously worsened and noted that musculoskeletal conditions tended to worsen over time. He opined that appellant's degenerative changes were due to her occupational injury that occurred in 2005 and that, as time progressed, those injured body parts developed degeneration and increasing spurring ultimately lead to the worsening that appellant experienced on February 10, 2015. Dr. Chauhan found that appellant could continue modified part-time work. In a report dated April 14, 2016, he provided work restrictions including no more than one continuous hour of telephone and keyboard usage alternated with one hour of other activities, and working only six hours a day.

By decision dated May 24, 2016, an OWCP hearing representative vacated the June 29, 2015 OWCP decision and remanded the claim for additional development of the medical evidence.

On July 20, 2016 OWCP referred appellant, a statement of accepted facts (SOAF) and a list of questions to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On July 13, 2016 the employing establishment offered appellant a limited-duty position as an accounts management contact representative working six hours a day. The work restrictions of the offered position included one hour of keyboarding and telephone use followed by one hour with no keyboarding or telephone use. Appellant accepted this position on August 22, 2016.

On September 23, 2016 Dr. Swartz completed his second opinion evaluation, provided his findings on physical examination, and concluded that there was no evidence that appellant was totally disabled from February 9, 2015 through January 8, 2016. He also reported that she had relatively mild degenerative changes in her cervical spine with no evidence of radiculopathy on physical examination. Dr. Swartz proposed appellant's work restrictions should include 20 minutes of computer work at a time alternated with a 10-minute break and that she continue working 6 hours per day. He found that diagnostic studies from November 1, 2016 demonstrated minimal right carpal tunnel syndrome and right frozen shoulder due to biceps tendinitis.

In a supplemental report dated November 7, 2016, Dr. Swartz reviewed appellant's diagnostic studies and diagnosed an employment-related partial tear of the subscapularis of the left shoulder. He determined that she could perform repetitive work for no more than six hours a day, but could work an additional two hours performing nonrepetitive activities.

By decision dated November 14, 2016, OWCP denied appellant's claims for compensation for total disability during the period February 9, 2015 through January 7, 2016.⁴

⁴ By decisions dated November 15, 2016, OWCP denied appellant's claims for wage-loss compensation on the date of July 5, 2016, and from September 14 through 16, 2016.

In a letter dated November 15, 2016, OWCP provided Dr. Chauhan with Dr. Swartz's reports and requested his detailed comments should he disagree with Dr. Swartz's findings.

In reports dated November 22 and 30, and December 28, 2016, Dr. Chauhan reviewed and addressed Dr. Swartz's findings. He disagreed with Dr. Swartz's finding that appellant was not totally disabled from February 9, 2015 through January 8, 2016 and continued to opine that she was totally disabled during this period based on his review of Ms. Duncan's reports. Dr. Chauhan further noted that her x-rays, physical findings of impingement of the left shoulder, and limited cervical range of motion constituted objective findings which existed during the period February 9, 2015 through January 8, 2016, during which she claimed she was totally disabled. He contended that her work activities caused accelerated cervical spine degeneration leading to cervical spinal stenosis.

On January 23, 2017 OWCP expanded acceptance of appellant's claim to include left shoulder impingement.

By decision dated January 27, 2017, OWCP issued a loss of wage-earning capacity determination and reduced appellant's wage-loss compensation effective August 22, 2016 based on her actual earnings as an accounts management contact representative working 30 hours a week with wages of \$807.20 per week effective August 22, 2016. It found that she had a loss of wage-earning capacity of \$475.00 every four weeks.

On February 24, 2017 appellant requested a review of the written record from OWCP's Branch of Hearings and Review.

On March 13, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for the period March 9 through 11, 2017. She provided a March 9, 2017 duty status report (Form CA-17) from Dr. Chauhan which indicated that she was temporarily totally disabled from March 9 through 11, 2017.

In a development letter dated March 20, 2017, OWCP requested additional medical evidence supporting appellant's total disability for the period alleged. It afforded her 30 days to respond.

In a March 9, 2017 report, Dr. Chauhan noted that appellant was experiencing increased left shoulder pain. He opined that her left shoulder was frozen resulting in pain and headaches. Dr. Chauhan reported that appellant was experiencing a "spontaneous flare up" of her accepted left shoulder condition with significant limitation of range of motion, muscle strength, and secondary pain. He found that she was temporarily totally disabled for two days.

By decision dated June 2, 2017, OWCP's hearing representative affirmed the January 27, 2017 wage-earning capacity determination, finding that appellant had not met her burden of proof to modify that decision.

On June 26, 2017 appellant requested reconsideration of the June 2, 2017 decision and alleged that the original wage-earning capacity determination was in error as her position continued to be that of a customer service contact representative rather than an accounts management contact representative.

By decision dated July 14, 2017, OWCP denied appellant's request for reconsideration, finding that appellant had worked in the modified position of accounts management contact representative for 60 days and this position properly formed the basis for her loss of wage-earning capacity determination.

On November 8, 2017 appellant requested reconsideration of the November 14, 2016 OWCP decision denying wage-loss compensation for total disability from February 9, 2015 through January 7, 2016. In an accompanying October 28, 2017 letter, she alleged that OWCP failed to consider all of the medical evidence of record when evaluating her claim. Appellant discussed diagnostic studies dating from September 6, 2005 through October 31, 2017. In support of her request for reconsideration, she provided copies of Dr. Swartz's reports, a copy of Dr. Chauhan's November 30, 2016 report, and an October 31, 2016 magnetic resonance imaging (MRI) scan of her left shoulder.

By decision dated February 23, 2018, OWCP denied appellant's claim for total disability for the period March 9 through 11, 2017.

By decision dated March 12, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim from the November 14, 2016 decision which denied wage-loss compensation for total disability for the period February 9, 2015 through January 7, 2016, finding that the evidence submitted was repetitious and cumulative.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁶

Under FECA the term "disability" is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury.⁷

Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁸ Whether a particular injury causes an employee to be disabled from work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative, and substantial medical evidence.⁹

⁵ *Supra* note 1.

⁶ *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *G.T.*, Docket No. 07-1345 (issued April 11, 2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁸ *See S.J.*, *supra* note 6; *Edward H. Horton*, 41 ECAB 301 (1989).

⁹ *See S.J.*, *supra* note 6; *Tammy L. Medley*, 55 ECAB 182 (2003).

For each period of disability claimed, the employee has the burden of proof to establish that she was disabled for work as a result of the accepted employment injury.¹⁰ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹¹

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.¹² Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹³ The opinion of the physician must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship.¹⁴

OWCP's procedures provide that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.¹⁵ The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination.¹⁶ This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination.¹⁷ This narrow exception is only applicable for brief periods of medical disability.¹⁸ OWCP procedures provide, "If the claimant is off work for a brief period due to his/her temporary inability to perform the duties of the rated position, this period of medical disability can be paid without modification of the loss of wage-earning capacity determination, e.g., a brief recovery period after surgery or an injection with a subsequent day of disability."¹⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish total disability for the period March 9 to 11, 2017, causally related to her accepted employment injury.

¹⁰ See *S.J.*, *supra* note 6; *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹¹ See *S.J.*, *supra* note 6; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² See *S.J.*, *supra* note 6; *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹³ See *S.J.*, *supra* note 6; *Elizabeth Stanislaw*, 49 ECAB 540 (1998).

¹⁴ *Id.*

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Modification of Loss of Wage-Earning Capacity Decision*, Chapter 2.1501.3 (October 2013).

¹⁶ *S.J.*, Docket No. 16-1195 (issued January 4, 2017).

¹⁷ *Id.*; *J.B.*, Docket No. 15-1817 (issued April 1, 2016); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁸ *S.J.*, *supra* note 16; *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁹ *Supra* note 15 at Chapter 2.1501.10 (June 2013).

OWCP issued a loss of wage-earning capacity determination in this case on January 27, 2017. It found that appellant's actual earnings as an accounts management contact representative working 30 hours a week fairly and reasonably represented her wage-earning capacity.

On March 13, 2017 appellant filed a claim for compensation (Form CA-7) for the period March 9 to 11, 2017. In adjudicating this claim in its February 23, 2018 decision, OWCP determined that she was not entitled to disability compensation for the period commencing March 9 through 11, 2017. Thus, in the case at hand, appellant is claiming a limited period of disability and OWCP properly determined that this claim should not be developed as a request for modification of wage-earning capacity determination. Rather, she has the burden of establishing that her disability for the limited period in question was causally related to the accepted July 25, 2005 employment injury.²⁰

The Board finds that the medical evidence of record is insufficient to establish disability for the period claimed.

The issue of disability from work can only be resolved by competent medical evidence.²¹ Whether a claimant's disability is causally related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.²² A physician's opinion on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.²³

Appellant provided two notes from Dr. Chauhan dated March 9, 2017. Dr. Chauhan reported that appellant was experiencing increased left shoulder pain and opined that her left shoulder was frozen resulting in pain and headaches. He noted that appellant was experiencing a "spontaneous flare up" of her accepted left shoulder condition with limited range of motion and, muscle strength, as well as pain. Dr. Chauhan found that she was temporarily totally disabled for two days, March 9 to 11, 2017. The Board has held that the mere diagnosis of "pain" does not constitute the basis for payment of compensation.²⁴ As appellant has not submitted rationalized medical opinion evidence sufficient to establish that she was unable to work for the period March 9, to 11, 2017 due to the accepted conditions, she failed to establish that the claimed disability was employment related. She was thus not entitled to wage-loss compensation for this period.²⁵

²⁰ *T.M.*, Docket No. 16-0343 (issued September 19, 2017); *Sandra D. Pruitt*, *supra* note 17.

²¹ *T.M.*, *id.*; *R.C.*, 59 ECAB 546 (2008).

²² *Id.*

²³ *Id.*

²⁴ *T.M.*, *supra* note 20; *Robert Broome*, 55 ECAB 339 (2004).

²⁵ *T.M.*, *supra* note 20.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.²⁶ Section 8128(a) of FECA²⁷ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time on his own motion or on application.²⁸ To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.³⁰

When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.³¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

The underlying issue on appeal was whether appellant has submitted sufficient medical evidence to establish total disability for the period February 9, 2015 through January 7, 2016. With her reconsideration request, appellant did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of her claim, based on the first and second above noted requirements under section 10.606(b)(3).³²

²⁶ 20 C.F.R. § 10.607(a).

²⁷ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

²⁸ *Id.*; *L.S.*, Docket No. 18-0811 (issued November 13, 2018).

²⁹ 20 C.F.R. § 10.606(b)(3); *see also L.S., id.*

³⁰ *Id.* at § 10.608(b).

³¹ *L.S., supra* note 28; *Annette Louise*, 54 ECAB 783 (2003).

³² *Supra* note 29.

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted new medical evidence from Dr. Chauhan, which addressed the relevant issue of causal relationship.

In a letter dated November 15, 2016, OWCP provided Dr. Chauhan with Dr. Swartz's reports and requested that he offer his opinion regarding Dr. Swartz's conclusions. In his November 22 and 30, and December 28, 2016 reports, Dr. Chauhan responded to OWCP's request by reviewing and addressing Dr. Swartz's conclusions. He disagreed with Dr. Swartz's finding that appellant was not totally disabled from February 9, 2015 through January 8, 2016. Dr. Chauhan opined that appellant's x-rays, physical findings of impingement of the left shoulder, and limited cervical range of motion constituted objective findings which existed during the period February 9, 2015 through January 8, 2016, during which she claimed she was totally disabled. He contended that appellant's work activities caused accelerated cervical spine degeneration leading to cervical spinal stenosis.

The Board finds that the opinion and reasoning expressed in Dr. Chauhan's narrative, including the report of November 30, 2016 and an October 31, 2016 magnetic resonance imaging (MRI) scan of her left shoulder, constitutes relevant and pertinent new evidence not previously considered by OWCP. Dr. Chauhan's opinion directly addressed the basis upon which OWCP denied appellant's claim as it addressed the issue of causal relationship between her accepted employment injuries condition and alleged period of total disability from February 9, 2015 through January 8, 2016.³³ In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.³⁴ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.³⁵ Appellant's request for reconsideration met one of the standards for obtaining a merit review of her case. Accordingly, she is entitled to a merit review.

The Board will, therefore, set aside OWCP's March 12, 2018 decision and remand the case for an appropriate merit decision on appellant's claim. After such further development of the evidence as might be necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability from work for the period March 9 to 11, 2017, causally related to her accepted employment injury. The Board further finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

³³ *M.C.*, Docket No. 17-1983 (issued August 17, 2018).

³⁴ *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

³⁵ *See also L.S.*, *supra* note 28; *Mark H. Dever*, 53 ECAB 710 (2002).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed. It is further ordered that the March 12, 2018 decision is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: April 26, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board